



No. 87-1843

**In The
Supreme Court Of The United States**

OCTOBER TERM, 1987

JOHN F. KOLENBERG,
Petitioner,

v.

**THE BOARD OF EDUCATION OF THE
CITY OF STAMFORD, CONNECTICUT,**
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF CONNECTICUT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state court may, pursuant to state public policy governing the resolution of disputes between teachers and boards of education, require a teacher to exhaust available grievance and arbitration remedies under a collective bargaining agreement with respect to claims of violation of federal statutory and constitutional rights before seeking relief in the state courts, where those claims are part of a broader dispute relating to the agreement and where the grievance procedures are an appropriate vehicle for the resolution of those claims.
2. Whether, where a federal issue has not been raised in the state court below in a procedurally correct fashion under applicable state court rules, that issue may be raised before this Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CITATIONS	iii
COUNTERSTATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
I. CONNECTICUT'S REQUIREMENT THAT A TEACHER MUST EXHAUST APPLICABLE GRIEVANCE AND ARBITRATION REME- DIES PRIOR TO RAISING FEDERAL STAT- UTORY AND CONSTITUTIONAL CLAIMS IN THE CONNECTICUT STATE COURTS WITH RESPECT TO ISSUES ARISING WITHIN THE SCOPE OF A COLLECTIVE BARGAINING AGREEMENT IS CONSTI- TUTIONALLY PERMISSIBLE AND THE RULING BELOW DOES NOT IN ANY EVENT REQUIRE THAT THE OUTCOME OF THOSE REMEDIES BE GIVEN PRECLUSIVE EFFECT BY THE CONNECTICUT COURTS	6
II. PETITIONER FAILED TO RAISE HIS FEDERAL CONSTITUTIONAL CLAIMS IN A TIMELY MANNER	8
CONCLUSION	9
APPENDIX	
[DEFENDANT BOARD'S] OBJECTION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT	1A

TABLE OF CITATIONS

Cases:	Page(s)
<i>Alexander v. Gardner-Denver Co.</i> , 415 U.S. 36 (1974)	6
<i>Atchison, Topeka & Sante Fe Railway Co. v. Buell</i> , — U.S. —, 107 S. Ct. 1410 (1987)	6
<i>Barrentine v. Arkansas-Best Freight System</i> , 450 U.S. 728 (1981)	6
<i>Beck v. Washington</i> , 369 U.S. 541 (1962)	8
<i>Conference Center Ltd. v. TRC</i> , 189 Conn. 212, 455 A.2d 857 (1983)	3
<i>Kolenberg v. Board of Education</i> , 206 Conn. 113, 536 A.2d 583 (1988) (citations to Petitioner's Appendix)	2-5, 7-8
<i>Martinez v. California</i> , 444 U.S. 277 (1980)	7
<i>McDonald v. City of West Branch</i> , 446 U.S. 284 (1984)	6
<i>McNeese v. Board of Education</i> , 373 U.S. 668 (1963)	7
<i>Patsy v. Board of Regents of the State of Florida</i> , 457 U.S. 496 (1982)	7
<i>School Administrators Ass'n v. Dow</i> , 200 Conn. 376, 511 A.2d 1012 (1986)	7
 Constitutional Provision:	
Fourteenth Amendment, U.S. Constitution	3
 Statutes:	
42 U.S.C. §§ 1983, 1985 and 1986	3, 7
Connecticut General Statutes § 10-151	2, 3, 8



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COUNTERSTATEMENT OF THE CASE

In 1977, the Petitioner, John F. Kolenberg ("Kolenberg"), was a tenured school teacher employed by the Board of Education of the City of Stamford, Connecticut (the "Board"). In that year, Kolenberg requested a leave of absence for the academic year 1977-78 under the provisions of a collective bargaining agreement. Acting pursuant to the provisions of

the agreement, the Board granted the requested leave. The collective bargaining agreement in question required any teacher taking advantage of the provisions of such agreement to notify the Board of his or her intention to return from such leave not later than February 1 of the academic year for which the leave was taken in order to assure his entitlement to reemployment.

Kolenberg failed to notify the Board of his intention to return by the contractual deadline date. Instead, he gave notice approximately one and one-half months after the February 1 deadline. Consistent with the terms of the collective bargaining agreement, the Board treated Kolenberg's failure to give notice within the required time limit as a contractual election not to continue as a teacher, and concluded that he had ceased to be its employee. (Pet. App. 15A). The Board did not invoke Connecticut's statutory due process provisions for teacher termination because it regarded the employer-employee relation to have ended contractually pursuant to the collective bargaining agreement.

The collective bargaining agreement containing the leave and notice of return provisions established a formal procedure for pursuing grievances with respect to claims of violations, misinterpretations, or misapplications of the provisions of the agreement. This grievance process included rights to arbitration and appeal to and review by the Connecticut courts. (Pet. App. 22A).

Kolenberg commenced, but did not pursue, a grievance with respect to the Board's position under the grievance procedures established by the collective bargaining agreement. (Pet. App. 23A). Instead, in October, 1978, he brought this case in the Connecticut Superior Court, claiming, *inter alia*, to have been denied statutory notice and hearing rights available under Connecticut General Statutes § 10-151 to tenured teachers whose employment is terminated for cause or elimination of position.

In May, 1984, nearly six years after the commencement of the action, Kolenberg filed with the Connecticut Superior Court a motion for leave to amend his complaint in order to add claims of due process violations proscribed by 42 U.S.C. §§ 1983, 1985 and 1986, and the due process and equal protection clauses of the fourteenth amendment to the United States Constitution. The Board objected to this motion on several grounds, including: (1) the almost six-year delay between the closing of the pleadings and the filing of Kolenberg's motion, (2) the bar to such claims of the applicable statutes of limitations and the doctrine of laches, (3) additional discovery burdens which the claims would place on the Board, (4) unfair delay and prejudice to the Board, and (5) failure to state a claim under the cited federal statutes and constitutional provisions. Respondent's Appendix at 1A-2A. Acting pursuant to its discretionary powers, see *Conference Center Ltd. v. TRC*, 189 Conn. 212, 216, 455 A.2d 857, 860 (1983), the superior court denied Kolenberg's motion for leave to amend. (Pet. App. 16A).

Subsequently, the superior court held that Kolenberg's failure to give the required notice of his intent to return operated as a constructive resignation and therefore that the protections of § 10-151 were not available to him. (Pet. App. 11A-12A).

Kolenberg then appealed and his case was placed on the docket of the Connecticut Supreme Court. The supreme court held that Kolenberg was not entitled to access to the courts by virtue of § 10-151 because his employment was not terminated for cause within the meaning of that statute. The court therefore ruled that Kolenberg's case should be dismissed.

In its decision, the court also rejected several claims by Kolenberg relating to the operation of the collective bargaining agreement, including federal constitutional claims. Citing Connecticut statutes evidencing a preference for resolving disputes between teachers and boards of education through

contract grievance proceedings, the court held that those claims should have been pursued under the grievance procedures of the collective bargaining agreement and that Kolenberg's failure to exhaust the grievance and arbitration remedies available under the collective bargaining agreement before seeking redress in the state courts deprived the trial court of subject matter jurisdiction over the claims as a matter of Connecticut law. The court concluded that the requirement of exhaustion applied to all of these claims, including Kolenberg's contention that his tenure was a protected property right under the federal constitution violated by the non-renewal provisions of the collective bargaining agreement, because the grievance procedures were an appropriate vehicle for the resolution of these claims. The court held further that these claims were in any event not properly before the court under applicable Connecticut procedural rules because they were not raised below, and did not arise after trial. (Pet. App. 21A-23A).

SUMMARY OF THE ARGUMENT

Kolenberg states that "the Connecticut Supreme Court has denied Petitioner the right to have his federal constitutional guarantees protected in state court. It has done so under the erroneous belief that where an arbitration clause exists, the state court is foreclosed from protecting constitutionally-granted individual rights." (Pet. 12).

This characterization of the Connecticut Supreme Court's position is not accurate. The court's decision does no more than insist that a teacher pursuing issues, including federal constitutional issues, involving the operation of a collective bargaining agreement must, in the interests of the orderly administration of justice, and consistent with state policies governing the resolution of disputes between teachers and boards of education, first pursue established grievance and arbitration remedies under the collective bargaining agreement to which the teacher is subject, before resorting for relief to the Connecticut state courts. Moreover, and for similarly sound reasons of judicial policy, the Connecticut Supreme Court has insisted that federal constitutional claims like Kolenberg's must be raised within the same procedural framework as is applicable to any claim brought in the state's courts and that Kolenberg's failure to raise his federal claims in a timely and procedurally proper manner therefore precludes their consideration by the Connecticut courts. (Pet. App. 21A-23A).

ARGUMENT

I. CONNECTICUT'S REQUIREMENT THAT A TEACHER MUST EXHAUST APPLICABLE GRIEVANCE AND ARBITRATION REMEDIES PRIOR TO RAISING FEDERAL STATUTORY AND CONSTITUTIONAL CLAIMS IN THE CONNECTICUT STATE COURTS WITH RESPECT TO ISSUES ARISING WITHIN THE SCOPE OF A COLLECTIVE BARGAINING AGREEMENT IS CONSTITUTIONALLY PERMISSIBLE AND THE RULING BELOW DOES NOT IN ANY EVENT REQUIRE THAT THE OUTCOME OF THOSE REMEDIES BE GIVEN PRECLUSIVE EFFECT BY THE CONNECTICUT COURTS.

Kolenberg contends that the Connecticut Supreme Court's decision conflicts with several cases (*Atchison, Topeka & Sante Fe Railway Co. v. Buell*, ____ U.S. ____, 107 S. Ct. 1410 (1987); *McDonald v. City of West Branch*, 446 U.S. 284 (1984); *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981); and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)), see Pet. 7-10, decided by this Court which hold that federal courts may not give preclusive effect to an arbitration award where federal statutory or constitutional rights are asserted with respect to matters within the scope of the collective bargaining agreement under which the arbitration has been conducted. However, the Connecticut court's position does not affect the federal courts and represents a sound and appropriate rule designed to assure the orderly resolution of disputes between teachers and boards of education in Connecticut.

In the first place, the opinion below only requires that a teacher exhaust grievance and arbitration remedies before resorting to state court review. The court explicitly contemplates the availability of court relief after exhaustion has occurred. There is no holding in the opinion that state court review of constitutional issues would necessarily be subject to preclusion resulting from determinations growing out of grievance and arbitration proceedings.

In addition, while it is true that this Court has determined that claims in the federal courts pursuant to 42 U.S.C. § 1983 are not subject to exhaustion of administrative remedies, *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982); *McNeese v. Board of Education*, 373 U.S. 668 (1963), the cases do not bar state court invocation of the exhaustion requirement in appropriate circumstances in order to reasonably regulate the access of claimants to state courts, at least where, as here, court relief is available following exhaustion. *Cf. Martinez v. California*, 444 U.S. 277, 284, n. 7 (1980).

As the Connecticut Supreme Court points out, an arbitration award pursuant to the collective bargaining agreement containing the leave and notice of intent to return provisions at issue here is subject to a right of appeal to the Connecticut courts. (Pet. App. 22A). Moreover, in *School Administrators Ass'n v. Dow*, 200 Conn. 376, 511 A.2d 1012 (1986), the leading Connecticut case requiring exhaustion of grievance and arbitration remedies with respect to the resolution of disputes between teachers and boards of education, the court expressly states that "the plaintiffs therefore should have pursued their claims under the grievance-arbitration provisions of their collective bargaining agreement *before seeking redress in state court.*" (Emphasis added). *Id.* at 383, 511 A.2d at 1016. The court thus makes it clear that court review is available once exhaustion has occurred. *Dow* also notes that under Connecticut law, legal principles, including constitutional claims, may be addressed in the grievance and arbitration process. *Id.* n. 4.

The court's decision is consequently not one giving "preclusive" effect to arbitration decisions. Rather, the court only insists that, where available, as they were here, grievance and arbitration procedures under a collective bargaining agreement must precede the assertion of a claim in state court with respect to an employment issue where the relief requested is within the scope of the contractual remedies available. *See id.* at 382-385, 511 A.2d at 1016. This rule is a reasonable one designed to assure the orderly administration of justice

and to respect Connecticut's strong preference for resolving disputes between teachers and boards of education through contract grievance proceedings where possible. (Pet. App. 22A-23A).

II. PETITIONER FAILED TO RAISE HIS FEDERAL CONSTITUTIONAL CLAIMS IN A TIMELY MANNER.

The Connecticut Supreme Court's opinion below also holds that Kolenberg's claims relating to the operation of the collective bargaining agreement were not made in timely fashion in accordance with applicable state court rules and that they are therefore in any event subject to dismissal without regard to the merits. (Pet. App. 21A). Kolenberg makes no claim that Connecticut's rules of practice with respect to the raising of claims in the Connecticut courts are in violation of federal constitutional guarantees.

Kolenberg's federal constitutional claim that the non-renewal provision of the collective bargaining agreement violated a property right to tenure was not raised until the appeal stage in this litigation. The viability of Kolenberg's assertion that the Connecticut court's exhaustion rule conflicts with this Court's decisions necessarily depends upon the viability of his federal constitutional attack on the collective bargaining agreement provisions regarding leave and notice of intention to return. His delay in making this attack until the appeal stage of his case precludes him from raising here the question of the consistency of Connecticut's exhaustion rule with this Court's decisions. *See Beck v. Washington*, 369 U.S. 541, 550-554 (1962).

As the Connecticut Supreme Court notes, claims must, under Connecticut law, be raised properly before the trial court if they are to be available for assertion at the appellate court level. (Pet. App. 21A). The federal claims raised by the attempted amendment to the complaint before the superior

court in 1984 did not assert that the collective bargaining agreement provision in question violated Kolenberg's right to tenure. Moreover, his motion for leave to amend was in any event properly denied. In addition, Kolenberg's claims before the superior court sought rights to notice and hearing pursuant to § 10-151 which the supreme court has held are not available because of his failure to satisfy the requirements of the agreement for entitlement to reemployment.

Connecticut is entitled to establish a reasonable procedure for the orderly handling of claims in its courts. It has done so. Kolenberg has failed to preserve and pursue his federal claim in accordance with Connecticut procedural requirements and therefore is in any event not entitled to relief.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the petition should be denied.

Respectfully Submitted,

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June 1988

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**APPENDIX TO
RESPONDENT'S BRIEF**



**[DEFENDANT BOARD'S] OBJECTION
TO PLAINTIFF'S MOTION FOR LEAVE
TO AMEND COMPLAINT**

The defendants in the above action hereby object to the plaintiff's motion, dated May 30, 1984, to file an amended complaint. This objection is made on the following grounds:

1. The original complaint action was filed in 1978 concerning events which took place in 1978. As filed, it alleges only violations of state law.
2. In his proposed amendment complaint, the plaintiff seeks to allege for the first time violations of four sections of the Civil Rights Act of 1871, 42 U.S.C. § 1983, 1985 and 1986 and the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.
3. The actions complained of took place more than six years ago, and any claim under the above cited sections is barred by the statute of limitations and by the doctrine of laches. *Board of Regents v. Tomanio*, 446 U.S. 478 (1980); *Park v. Board of Trustees of City University of New York*, 654 F.2d 856 (2d Cir. 1981), *cert. denied*, 455 U.S. 1000; *Williams v. Walsh*, 558 F.2d 667 (2d Cir. 1977); Sec. 52-577 C.G.S. Amendment should not be allowed where the claim sought to be added would be defeated by a motion to dismiss.
4. The pleadings have been closed in this case for nearly six years.
5. On May 16, 1984, the defendants took the deposition of the plaintiff, John Kolenberg, restricting their inquiry to the claims stated in the complaint as it had existed since 1978.

6. Amendment of the complaint to add new allegations of legal violations at this date would necessitate another deposition of the plaintiff and/or other discovery to ascertain the basis of these new causes of action.

7. Allowance of the proposed amendment at this date six years after the action was commenced would unfairly delay the trial of this case and would prejudice the defendants.

8. The proposed amendment would fail to state a claim under any of the cited federal statutes or constitutional provisions.

WHEREFORE, the plaintiff's Motion for Leave to File Amendment to Complaint should be denied.

THE DEFENDANTS,
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